

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF HAWAII

In the Matter of the Application of)
PUBLIC UTILITIES COMMISSION)
Instituting a Proceeding to Investigate the)
Implementation of Feed-in Tariffs.)
_____)

DOCKET NO. 2008-0273

PUBLIC UTILITIES
COMMISSION

2009 FEB 25 P 3:24

FILED

**TAWHIRI POWER LLC'S
OPENING STATEMENT OF POSITION;**

EXHIBIT "A";

AND

CERTIFICATE OF SERVICE

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**TAWHIRI POWER LLC'S
OPENING STATEMENT OF POSITION**

TO THE HONORABLE PUBLIC UTILITIES COMMISSION OF THE STATE OF HAWAII:

Pursuant to the Hawaii Public Utilities Commission's (the "Commission") Order Approving The HECO Companies' Proposed Procedural Order, As Amended, filed herein on January 20, 2009 ("Procedural Order"), TAWHIRI POWER LLC ("TPL") hereby submits to the Commission its Opening Statement Of Position with respect to the Statement Of Issues set forth on pages 8 and 9 of the Procedural Order. Additionally, attached hereto as Exhibit "A" and made a part hereof, are the general comments of TPL's consultant, Dr. Mohamed El-Gasseir, with respect to Project-Based Feed-In Tariffs. Dr. El-Gasseir has extensive experience and knowledge in regards to: (1) the HECO systems; (2) electric industry restructuring; (3) stranded assets, revenue dynamics and rate stability issues; (4) renewable energy economics; (5) distributed resources planning; (6) self-generation assessment; and (7) integrated resource planning. These areas of expertise are part of the knowledge base that would be needed in the consideration of feed-in tariffs. Additionally, Dr. El-Gasseir has advised regulatory and planning commissions for the States of California, New York, Connecticut, New Jersey, and Nevada. He has also been engaged by many utilities, including some of the largest investor-owned companies

such as Con Edison of New York, Commonwealth Edison of Chicago, Pacific Gas & Electric Company, Detroit Edison, Southern Energy, and British Columbia Hydro (to name a few).

I. STATEMENT OF ISSUES

Purpose Of Project-Based Feed-In Tariffs (PBFiTs)

1. What, if any, purpose do (sic) PBFiTs play in Meeting Hawaii's clean energy and energy independence goals, given Hawaii's existing renewable energy purchase requirements by utilities?

Response:

If properly designed and implemented, PBFiTs will play an important role in the encouragement and development of renewable energy production in the State of Hawaii, along with those other essential incentives embodied within PURPA, Renewable Portfolio Standards ("RPS") and Net Energy Metering ("NEM"). PBFiTs will provide the certainty needed by developers of renewable energy projects for predictable revenue streams to secure reasonable returns on their investment. However, as previously cautioned by TPL's consultant, Dr. Mohamed El-Gassier, the PBFiT "debates [must be] conducted in full transparency and without compromising the due process requirements for such important public policy proceedings." Response to Question No. 14 in Exhibit "A" attached to Tawhiri Power LLC's Comments To Scoping Paper Appendices A and C (Non-Legal Questions) filed herein on January 26, 2009 ("TPL's Scoping Paper Comments"). Additionally, PBFiTs should first be introduced as a "pilot-program" at the distribution level with the guiding principle that when fully implemented PBFiTs **shall do no harm** to present Independent Power Producers ("IPPs") holding existing contracts with the utilities.

2. What are the potential benefits and adverse consequences of PBFiTs for the utilities, ratepayers and the State of Hawaii?

Response:

PBFiTs could potentially benefit the utilities by enabling them to use distribution-level renewable resources in combination with other renewable energy programs to meet increased RPS goals as mandated by the Hawaii Clean Energy Initiative Agreement ("HCEI"). However, the utilities' statutory obligation to ensure system reliability and stability will be increasingly challenged as variable-generation PBFiTs proliferate within each island's power grid. Inevitably, curtailment of subtransmission and transmission-level renewable generation becomes

unavoidable. Curtailing renewable generation in favor of higher cost fossil generation is being practiced today. Without designing and instituting adequate remedies, PBFiT's development will eventually lead to significant declines in renewable energy deliveries from lower cost sources to make room for higher cost generation. And, without fair compensation for curtailed energy, the FiT will do unintended harm by discriminating between curtailable and uncurtailable renewable energy generators. The end result will be costly lawsuits, glaring economic inefficiencies, unjustified rate increases, and cost shifting between low and high-voltage ratepayer classes.

PBFiT's will permit ratepayers to progressively keep more of the dollars they spend on electricity in Hawaii as the need for importing fuels diminishes. Capital retention and the associated multiplier effect and job creation opportunities will improve Hawaii's economy. Additionally, renewable energy generation will reduce the production of greenhouse gases and other harmful byproducts of burning fossil fuels to generate electricity.

However, as Dr. El-Gasseir opines in this Docket an "overly ambitious schedule is simply unrealistic and irrational. [While TPL] supports the establishment of feed-in tariffs for promoting renewable energy growth in Hawaii, . . . instituting PBFiT's to increase renewables' share of electricity generation at a high pace of development represents a monumental paradigm shift that cannot be rushed through the proposed schedule[.]" Response to Question No. 5 in Exhibit "A" attached to TPL's Scoping Paper Comments [emphasis in original].

3. Why is or is not the PBFiT the superior methodology to meet Hawaii's clean energy and energy independence goals?

Response:

As stated in TPL's Scoping Paper, PBFiT's are NOT superior to other methods for requiring utilities to purchase renewable electricity. *Id.* at Response to Question No. 6. First, PBFiT's will almost always lead to feed-in tariff energy being more expensive than the utilities' avoided costs. Second, without proper mitigation of the financial impacts of curtailment of IPP energy deliveries, they will undermine the viability of existing generators, degrade their property values and possibly force some projects to be abandoned. But if a PBFiT program is designed from the outset to do no harm to projects developed under PURPA, RPS and NEM mechanisms, PBFiT's can accelerate renewable generation development to meet Hawaii's clean energy and energy independence goals at least cost.

Legal Issues

4. What, if any, modifications are prudent or necessary to existing federal or state laws, rules, regulations or other requirements to remove any barriers or to facilitate the implementation of a feed-in tariff not based on avoided costs?

Response:

First, there are no barriers imposed by PURPA to implementation of PBFiTs because the United States Supreme Court has previously declined to overrule a decision by the New York Court of Appeals that upheld a New York State Law that required utilities to purchase power at a rate that exceeded avoided costs. See Consolidated Edison Co. of New York, Inc. v. Public Service Com'n of State, 63 N.Y. 2d 424, 483 N.Y.S. 2d 153 (1984), *appeal dismissed*, Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York, 470 U.S. 1075, 105 S.Ct. 1831 (1985) [Appeal dismissed for want of a substantial federal question]. Footnote 8 of the New York Court of Appeals decision recognized that

FERC left the States free to utilize their own means of encouraging alternate energy production, stating: "The Commission has become aware that several States have enacted legislation requiring electric utilities in that State to purchase the electrical output of facilities * * * at rates which may differ from the rates required under the Commission's rules implementing section 210 of PURPA. "This Commission has set the rate for purchases at a level which it believes appropriate to encourage cogeneration and small power production, as required by section 210 of PURPA. While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, **the States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies.** However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement to these technologies, and must yield to federal Law. "If a State program were to provide that electric utilities must purchase power from certain types of facilities, among which are included 'qualifying facilities,' at a rate higher than that provided by these rules, a qualifying facility might seek to obtain the benefits of that State program. In such a case, however, **the higher rates would be based on State authority to establish such rates, and not on the Commission rules.** * * * "The Commission finds no inconsistency in a facility's taking advantage of section 210 in order to obtain one of its benefits, while relying on other

authority under which to buy from or sell to a utility.”
(Preamble to FERC Rules, 45 Fed Reg 12214, 12221-12222.) Hence, it appears no modifications to existing federal laws, rules, regulations or other requirements are needed.

63 N.Y.2d at 437 [Emphasis added].

Based upon the above, no amendments will be required to the applicable federal laws, rules, or regulations.

With respect to state laws, HRS § 269-27.2(c) requires that “the [C]ommission shall establish that the rate for purchase of electricity by a public utility shall not be more than one hundred per cent of the cost avoided by the utility when the utility purchases the electrical energy rather than producing the electrical energy.” [Emphasis added]. Therefore, TPL believes that the current language of HRS § 269-27.2(c) needs to be amended to permit the Commission to approve and adopt PBFiTs payment rates that exceed the utility’s avoided cost.

5. What evidence must the commission consider in establishing a feed-in tariff and has that evidence been presented in this investigation?

Response:

According to Chapter 6-61 of the Hawaii Administrative Rules (“HAR”), the Hawaii Rules of Evidence do NOT apply to the proceedings in this Docket. Instead, the Commission is only constrained “by considerations of relevancy, materiality, and repetition by the rules of privilege recognized by law, and with a view to doing substantial justice. HAR § 6-61-43. Therefore, prepared testimony (HAR § 6-61-45), documentary evidence (HAR § 6-61-46), official records (HAR § 6-61-47), official notice of facts (HAR § 6-61-48), and additional evidence (HAR § 6-61-49), may be received by the Commission.

With respect to the inquiry whether such evidence has already been presented in this Docket in order for the Commission to establish PBFiTs, TPL is unequivocally of the opinion the record is insufficiently complete to support the same, especially in view of the fact PBFiTs will have far-reaching implications which would irreversibly affect the renewable energy landscape if they are not properly introduced and the proper remedies are not implemented. Therefore, a contested case hearing should be ordered by the Commission to ensure complete transparency and protect the due process rights of all parties involved in this Docket.

Role of Other Methodologies

6. What role do other methodologies for the utility to acquire renewable energy play with and without a PBFiT, including but not limited to power purchase contracts, competitive bidding, avoided cost offerings and net metering?

Response: As previously stated and set forth in TPL's Scoping Paper, PURPA, RPS, NEM, Power Purchase Contracts ("PPAs"), and other methodologies, should all be considered and encouraged to secure renewable energy generation to meet Hawaii's clean energy and energy independence goals at least cost to ratepayers. Therefore, PBFiTs is but one (1) of numerous programs from which private sector developers and entrepreneurs can select one, or more programs to meet their investment goals.

Given the relatively limited loads of the Islands (in particular Maui and the Big Island), the abundance of variable generation resources, and the inflexibilities of generation and transmission systems not designed to host significant levels of such resources, introducing PBFiTs at any voltage levels will result in utility curtailment of production and delivery of renewable generation from IPPs. It is no exaggeration to foresee shutdowns of existing IPP facilities, project abandonments and reluctance to invest in new IPP generation outside of the PBFiT program in force. Preventing such unintended consequences requires that the Commission develop and enforce a rule requiring compensation for all curtailed generation at rates no less than the host utility's short-run avoided costs.

Best design for a PBFiT or alternative method

7. What is the best design, including the cost basis, for PBFiTs or other alternative feed-in tariffs to accelerate and increase the development of Hawaii's renewable energy resources and their integration in the utility system?

Response: The "best design" for PBFiTs can be assured through the following 5-steps approach:

- i. Start PBFiTs implementation as a "pilot program" at the distribution level beginning with market-proven renewable generation technologies.
- ii. Require that all curtailed energy deliveries be compensated at rates no less than the host-utility's short-run avoided costs regardless of whether the generator is PBFiT seller or an IPP.
- iii. Bar the utilities, their subsidiaries and affiliates from competing for

any form of on-site (customer-based) generation, distributed generation or PBFiT investments because of irreconcilable conflicts of interest. Although the utilities may argue otherwise, eliminating even the appearance of a conflict of interest during the infancy phase of the PBFiT is essential to proper and objective evaluation of the pilot program while assuring a high level of integrity. This in turn will increase the confidence of ratepayers in the effort as they prepare to shoulder the burden of furthering Hawaii's clean energy and energy independence goals in an overly stressed economic environment.

- iv. Conduct a thorough and fully transparent evaluation of the potential direct and indirect impacts on ratepayers under this "pilot program". As suggested by many of the Intervenors in this Docket, a 2-year period of review would be adequate to conduct an assessment of the cost of operations of PBFiTs and whether their owners are anticipated to receive reasonable returns on their investments over the projected useful life of those projects based upon preliminary revenue and operational results.
- v. Direct Hawaii's utilities to prepare short and long-term plans for upgrading their generation, transmission and distribution systems for the purpose of maximizing the integration of variable and other forms of renewable generation resources while minimization the need to curtail them. The costs of these plans would have to be juxtaposed against the costs of compensating PBFiT and IPP generators for curtailed (undelivered) energy. The results from the "pilot program" and from this step should enable the Commission to establish the optimal balance between PBFiT growth and utility investments in grid upgrading.¹

Eligibility Requirements

- 8. What renewable energy projects should be eligible for which renewable electricity purchase methods or individual tariffs and when?

Response: PBFiTs should begin with market-proven technologies on a pilot-basis at the distribution level. Contemporaneously therewith, IPPs with existing PPAs should be permitted to elect to participate as PBFiTs or maintain operations under their PPAs. It is imperative that the Commission provide

¹ TPL participated with a large portion of the Intervenors in an attempt to prepare a mutually agreeable version of the Straw Tariff Sheet ("Intervenors' Straw Tariff") in response to the Straw Tariff Sheet proposed by the HECO Companies and Consumer Advocate ("HECO Straw Tariff"). However, because this Opening Statement of Position differs in several respects from the Intervenors' Straw Tariff, the same has not been attached hereto as an exhibit. Nonetheless, if presented with a choice of accepting either the Intervenors' Straw Tariff or HECO's Straw Tariff, TPL would favor the former over the latter.

the renewable energy community with a panoply of compensation choices for their generation purchased by the utilities. Additionally, IPPs who will bear the brunt of load erosion and expanding curtailment practice would have to be protected from income losses. As pointed out elsewhere in this document, the only fair and easy solution is to ensure compensation for all curtailed energy deliveries at rates no less than the short-run avoided costs of the host utility.

Analysis of the cost to consumers and appropriateness of caps

9. What is the cost to consumers and others of the proposed feed-in tariffs?

Response: As TPL understands PBFiTs, the tariff rate will be more than the utilities' avoided costs. Therefore, the consumer would be paying a premium for their energy consumption to encourage the laudable goals of clean energy and energy independence for Hawaii.

As currently proposed by the HECO Companies and Consumer Advocate, when adding new generation triggers the need to curtail energy deliveries, there will also be costs to be paid for by: (i) curtailable generators, whether they be PBFiTs and IPPs with PPAs; and (ii) ratepayers who have to forego cheaper IPP electricity to make room for higher cost utility generation. A decline in the contribution of transmission-level IPPs because of increasing encroachment by curtailment will deprive consumers from the benefits of economies of scale and competition. To maintain the focus on Hawaii's clean energy and energy independence goals, curtailed entities should be compensated for lost energy production at rates no less than the utilities' short-run avoided costs.

10. Should the commission impose caps based upon those financial effects, technical limitations or other reasons on the total amount purchased through any mechanism or tariff?

Response: Yes. As suggested in TPL's Scoping Paper, the Commission should set an initial cap for each utility equal to next year's forecasted increase in electricity demand (in kW) plus an adequate reserve margin adder if needed. (If a pilot project is implemented, the initial cap can be less than the projected load growth.). The total cap should be updated downward to account for projects entering the queue and upward for projects exiting it. The total cap should be updated once a year by accounting for subsequent years' demand growth.

Procedural Issues

11. What process should the commission implement for evaluating, determining and updating renewable energy purchased power mechanisms or tariffs?

Response:

In as far as the PBFiT's are concerned, TPL recommends what many of the Intervenors in this Docket have already suggested; a review period every two (2) years is necessary. During that review period, the PBFiT owners would be encouraged by the Commission to submit quarterly reports on their respective projects to determine whether the stated tariff rates should be increased or decreased to continue the development of additional PBFiT's. Such information would have to be submitted to the Commission under protective order to maintain its confidentiality. Thereafter, such information would be analyzed to publish updated tariff rates for subsequent PBFiT's.

The Commission should also be mindful of the impacts of instituting a PBFiT's program, even at a pilot level, on other purchase power mechanisms. In particular, TPL urges the Commission to establish a review process to monitor and evaluate three key elements that link all arenas of power supply, namely: (i) energy delivery curtailment (magnitudes, durations, frequency, timings for each affected generator); (ii) utility short-run avoided costs (evaluation methodology, software and data adequacy, forecasting transparency and resultant trends); and (iii) utility progress in the betterment of its grid agility for integrating variable generation at high penetration rates. Such process is indispensable if Hawaii is to be successful in its efforts to shift to renewable generation at the contemplated scale and the pace of development,

12. What are the administrative impacts to the commission and the parties of the proposed approach?

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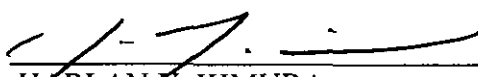
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Response:

Assuming the PBFiTs review period is every two (2) years, the Commission's staff workload would increase during the data submittal and review phases. Further, also assuming the PBFiTs owners submit quarterly reports to the Commission, their workload reporting requirements would increase accordingly.

Respectfully submitted.

DATED: Honolulu, Hawaii, February 25, 2009.



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**TAWHIRI POWER, LLC'S PROPOSED GUIDING PRINCIPLES
FOR UNHINDRED DEVELOPMENT OF
RENEWABLE ELECTRIC GENERATION RESOURCES IN HAWAII**

February 18, 2009

As currently conceived, the Feed-in Tariff (FiT) proposed by HECO and the CA will exacerbate curtailment of renewable energy interconnected at the transmission level, add to financial losses for existing independent power producers (IPPs), discourage investment in cost effective transmission-level (TL) renewable generation, unnecessarily limit the FiT to distribution-level (DL) development of renewables, create an investment environment favorable to utility programs, and needlessly require the imposition and micromanagement of caps on future development of FiT generation. Tawhiri Power, LLC (TPL) proposes a framework of principles to guide future development of renewable electricity generation at the fastest possible rate under a FiT without creating unintended consequences of the type expected from the HECO/CA proposal. Section 1 of this memo provides a statement of the TPL-proposed principles. Section 2 outlines the rationale underlying them.

1. Proposed Principles

The proposed framework consists of the following five principles:

1. Do No Harm: No development of renewable energy shall harm preceding renewable projects by causing them financial losses due to increased curtailment of energy deliveries because of limited load growth and inflexible utility generation and transmission systems. See Paragraphs 1 through 11 of Section 2 below.
2. Assure fair competition for renewable energy development: Neither HECO nor any of its affiliates should be allowed to participate in renewable energy development at any level or form. See Paragraphs 2 through 11 and 16 of Section 2 below.
3. Require HECO investment in increasing the agility of its utility systems: HECO generation and transmission systems should be upgraded to minimize the need to curtail IPP energy deliveries by maximizing each utility's absorptive capacity of variable renewable generation. See Paragraphs 1 through 5, 17 and 18 of Section 2 below.
4. Compensate IPPs for curtailed energy at utility avoided costs: Pay IPPs for generation they produce but cannot deliver to the host utility (because of unavoidable need to curtail supply) at prices equal to utility short-run avoided costs (SRACs). See Paragraphs 5 through 13 of Section 2 below.
5. Determine utility avoided costs fairly and accurately: Identify and adopt a credible methodology for accurate determination of SRACs through a fully transparent proceeding and in full observance of the requirements of due process with participation from all concerned parties. See Paragraphs 14, 15 and 18 of Section 2 below.

2. Rationale

1. The State of Hawaii is in the process of implementing policies aiming to integrate renewable electricity generation into the Islands' distribution and transmission systems at levels unprecedented anywhere in the developed world;
2. The Islands' loads are relatively very limited;
3. The Islands' electric grids and power plant systems are not designed to handle high levels of generation contributions from renewable energy resources;
4. Generation from existing renewable resources has been repeatedly curtailed by HECO utilities;
5. Although the causes and legitimacy of past utility curtailments of renewable generation are still at dispute, adding on more renewable generation resources will most likely lead to increased utility curtailment of existing and future curtailable renewable energy deliveries;
6. HECO is not likely to curtail renewable DL generators since it believes since control centers will see only net loads from distribution circuits;
7. On-site generation and self-generation are even less likely to be curtailed when the need arises;
8. Controlling generation interconnected at the distribution system to enable curtailment when needed could add substantial costs to FiT implementation and may prove to be institutionally and logistically impracticable;
9. Because of 8, the entire burden of future curtailments will fall on existing and future renewable resources interconnected at the transmission level;
10. Establishing and enforcing a seniority system for allocating future curtailments among renewable TL generators will not resolve the inequity resulting from new DL generation displacing energy from pre-existing TL renewable energy projects;
11. IPPs, including renewable generators, interconnected at the transmission level will be subjected to loss of income with curtailment;
12. Compensating IPPs for unavoidable curtailment of energy deliveries is the only means to preventing the unintended consequence of harming existing and future investments in transmission-level investments in renewable generation due to FiT implementation at the distribution level;
13. Compensating IPPs (for unavoidable curtailment of energy deliveries) at prices equal to accurately determined utility SRACs is the only means to assuring ratepayers' indifference and conformance with federal law requirements;
14. There are well-established methods for accurate determination of SRACs;
15. Identifying the best methodology for determining SRACs of Hawaii's electric utilities can be accomplished only through a fully transparent proceeding with uncompromised observance of the requirements of due process including assuring participation of all concerned parties unlike the Docket 7310 experience;
16. Direct or indirect investment by HECO in on-site generation programs creates irreconcilable conflicts of interest and unfair competition against IPPs at all levels and will stifle the development and growth of a competitive renewable energy industry in Hawaii;

17. HECO's financial and managerial resources are more suited for investments focused on upgrading the generation and transmission systems of its operating companies to increase their abilities for the purpose of minimizing the need to curtail renewable generation deliveries; and
18. Compensating IPPs for unavoidable curtailment of energy renewable energy deliveries provides the only means for accurate determination of the required HECO investments in improving the agility of its generation and transmission systems such that ratepayers would be better off financing system upgrades than paying for undelivered renewable energy.

CERTIFICATE OF SERVICE

The foregoing Opening Statement Of Position was served on the date of filing by hand delivery or electronically transmitted to each such Party.

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